

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

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77 - 730  
No.

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GENE THOMAS REEVES,  
*Petitioner,*

VERSUS

THE STATE OF OKLAHOMA,  
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA**

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November, 1977

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**In the**

**Supreme Court of the United States**  
**OCTOBER TERM, 1977**

**No.**

**GENE THOMAS REEVES,**  
**Petitioner,**

**V E R S U S**

**THE STATE OF OKLAHOMA,**  
**Respondent.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA**

---

TO: *The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.*

GENE THOMAS REEVES, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma entered in this proceeding on the 7th day of April, 1977.

In compliance with 28 U.S.C. 1257 and United States Supreme Court Rule 23, 28 U.S.C., we submit this petition.

**OPINION BELOW**

The opinion of the Court of Criminal Appeals of the State of Oklahoma is printed in Appendix "A" hereto. The Petition for Rehearing, timely filed with the Court of Crimi-

nal Appeals of the State of Oklahoma, is printed in Appendix "B" hereto. The Order Denying Petition for Rehearing is printed in Appendix "C" hereto. The Order for Staying Execution of Mandate is printed as Appendix "D" hereto, and Final Order Further Staying Mandate is printed in Appendix "E" hereto.

#### **JURISDICTION**

The judgment of the Court of Criminal Appeals of the State of Oklahoma (see Appendix "A") was entered on the 7th day of April, 1977. A timely petition for rehearing was denied on the 24th day of August, 1977, and is printed in Appendix "B" hereto. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. § 1257, in conjunction with United States Supreme Court Rule 19, 28 U.S.C.

#### **QUESTION PRESENTED**

The Prosecutor committed serious and reversible error in commenting during closing argument on the failure of the defendant to testify;

That the Trial Court committed reversible error in refusing to allow the defendant to introduce evidence of the prior sexual activities of the prosecutrix;

That the Trial Court committed error in not allowing the defendant to examine the prosecutrix and her father concerning a civil case they filed against the defendant;

That the Trial Court, over the objection of the defendant, permitted the State of Oklahoma to prove defendant's

prior conviction in the final stage of the bifurcated hearing after defendant, in open court, offered to stipulate to his prior conviction;

The State of Oklahoma was permitted to endorse an additional witness to give testimony-in-chief after the commencement of the trial, whereupon the defendant immediately requested a continuance, which request was denied;

The defendant was denied the right to secure the testimony of the examining doctor of the prosecutrix;

The evidence is insufficient to sustain the conviction and verdict of the jury.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Constitutional provisions relied upon by Petitioner are as follows:

The First Amendment to the United States Constitution, which reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution, which reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution, which reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, which in pertinent part reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

#### STATEMENT OF THE CASE

A felony information was filed on February 25, 1974, in the Cleveland County District Court Case Number CRF-74-108 against the defendant, Gene Thomas Reeves, charging the crime of Attempted Rape, Second and Subsequent Offense, contrary to the provisions of Title 21, O.S., Section 44. The information set forth the alleged crime occurred on February 22, 1974, and the alleged victim of this crime was Myrna Marrilee Mathis. On February 26, 1974, the defendant was arraigned and preliminary hearing set for March 21, 1974. The preliminary hearing was regularly held when scheduled, and the defendant was bound over for trial on the charge as set forth in the informations by the Magistrate. On May 14, 1974, the case was tried before a jury of twelve, and the defendant was found guilty of the crime as charged of "Attempted Rape, Second and Subsequent Offense" and his punishment set at twenty (20) years.

Sentencing was set by the Trial Court for May 29, 1974, and held on that date after overruling defendant's Motion for New Trial. The defendant was sentenced to serve twenty (20) years with the Department of Corrections of the State of Oklahoma, and on the same date, the defendant filed his written "Designation of Record and Notice of Appeal." Pending appeal, the defendant was released on the appearance bonds approved and posted in the Trial Court. Petition-in>Error was filed in this Honorable Court on November 19, 1974. Transcript and the Trial Court file were regularly and timely filed.

The trial of May 14, 1974, was assigned cause number F-74-761 on appeal and Opinion Reeves v. State, Okla.Crim., 535 P.2d 706 (1974), dated May 12, 1975, written by Judge Bliss reversed and remanded said conviction for a new trial.

On September 15 and 16, 1975, the case was re-tried with the Honorable Edward M. McDanel presiding over the trial. The testimony of Myrna Marrilee Mathis unfolded a story that on February 22, 1974, she went to the jewelry store owned and operated by defendant, Gene Thomas Reeves, about 5:30 o'clock p.m. with her sister, Raye Alleen, to take a ring belonging to their father to be examined by the defendant for the purpose of selling the ring. The girls were in the store about fifteen (15) minutes and there was a discussion between the defendant and the complaining witness about the complaining witness working for defendant. Miss Mathis left the defendant's store, went to the bank and withdrew some money, went home and discussed her working for defendant with her father, put on a dress, and was taken, by her sister about 6:00 o'clock p.m., back to defendant's store to work. Her sister was to return to pick her up at the defendant's store at 7:00 o'clock p.m. The defendant took Miss Mathis into the back room to show her how to engrave, and she said he started kissing her. There was another employee by the name of Jay King working in the store at this time. The defendant kissed her several times at the engraving machine, left to the front of the store to see some customers who came into the store, came back, and requested Miss Mathis count some money. She went to a desk near the doorway from the front showroom to the back stockroom to use an adding machine and

counted the money. When she finished counting the money, she stood up and Mr. Reeves started kissing her again, put his arms around her, pulled her dress up with one hand, while holding her tightly against him with the other, and pulled down her hose and underpants. He unzipped his pants, had his *hands* inside her pants, and by use of his fingers played with her private parts, or what she called fingering her. After a few minutes in this position, a customer came into the front showroom and stayed about five (5) minutes. The defendant loudly stated that, "We're closed." After the customer left and in a few minutes, the wife of the defendant came in the front door into the showroom, whereupon the defendant released the young complaining witness, fell onto the floor, got up, and stood by the doorway from the front showroom into the back storeroom. Miss Mathis walked into the front showroom and talked to the wife of defendant for about twenty (20) minutes and left with her sister and a friend, Cindy McGuffey, who had come after her. Miss Mathis testified she told the wife of defendant that the defendant tried to make love to her, and when she got in the car with her sister and Cindy McGuffey, she told them that the defendant tried to make love to her and detailed the events in the back storeroom to these girls as they drove around town for thirty (30) to forty-five (45) minutes. They returned to the defendant's store, talked to the defendant's wife for five (5) to ten (10) minutes, and then went to the home of Tim and Charlene Barnhill where they stayed about an hour. Miss Mathis' father came over to the Barnhill home, and she further testified that she went to the Moore Hospital that night and was examined by Dr. Bozell. Miss Mathis and McGuffey

both testified that Miss Mathis told everyone she discussed the incident with on the night of February 22, 1974, that she had been raped, and she talked to a great number of people about what took place.

The evidence at the trial reflected the prosecutrix was not raped and was in the backroom in the arms of the defendant in the jewelry store for about an hour, and there was apparently nothing that would or did prevent or deter the defendant from raping the prosecutrix, had that been his intent.

The prosecutrix testified that she tried to get away from the defendant, that he threatened her and he told her he would be easy with her during the many minutes the prosecutrix was held in the arms of defendant.

#### **REASONS FOR GRANTING THE WRIT**

Petitioner submits the following issues in support of his case:

The Assistant District Attorney began her opening closing argument to the jury and at page 278 of the transcript, and the first few sentences of said opening closing arguments, she stated as follows:

"Now, what were the facts? Well, the facts were from all the State's witnesses, *and were not contradicted by the Defendant*, that, indeed, Marrilee Mathis went to Mr. Reeves' jewelry store to work and that the only testimony we have of what happened in that jewelry store is from the victim Marrilee Mathis." (Emphasis ours)

The transcript of testimony at pages 281 and 282 further states as follows:

"Now, those are the things for you to consider is whether he did intend to have intercourse with her and whether he attempted to do so. I think the *only* testimony that you can consider there is the testimony of Marrilee Mathis on what he did at that store and whether he did intend to rape her." (Emphasis ours)

Immediately upon the conclusion by the Assistant District Attorney of her opening closing statement, the defendant moved for a mistrial because of the above statement (Tr. 286), which motion was denied and overruled (Tr. 287).

Title 22, Oklahoma Statutes, Section 701, provides as follows, *to-wit*:

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel, it shall be ground for a new trial."

This statute has been discussed and construed in many cases by the Court of Criminal Appeals of the State of Oklahoma.

In the case of *Boch v. State*, 80 Okl.Cr. 28, 156 P.2d 331, the county attorney states, "Why did not defendant deny the evidence here," and violated the statute forbidding com-

ment on defendant's failure to testify. On the other hand, indirect or subtle references given while in the act of giving conclusions on the evidence have not been held in violation of the statute, such as states testimony had not been contradicted by defense witness (*White v. State*, 76 Okl.Cr. 147, 134 P.2d 1039), or "the defendant had the stolen property. There is no other fact. Nobody has given you any other facts" (*Starr v. State*, 63 Okl.Cr. 302, 74 P.2d 1174), or that state's evidence was uncontradicted (*Chessier v. State*, 63 Okl.Cr. 84, 73 P.2d 191), and even statements that defendant's failure to present evidence (*Yeargain v. State*, 76 Okl.Cr. 50, 134 P.2d 142), or defendant's failure to offer any evidence and fact that jury had nothing before it but state's evidence (*Passmore v. State*, 87 Okl.Cr. 391, 198 P.2d 439), or that defendant could have put on witnesses in his defense was not improper (*Pierce v. State*, 96 Okl.Cr. 276, 253 P.2d 194), also see *Doty v. U. S.*, 416 F.2d 887 (1969); *Locklean v. U. S.*, 393 F.2d 729 (1968); *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965), and *Anderson v. Nelson*, 390 U.S. 523, 523-524, 88 S.Ct. 1133, 1134, 20 L.Ed.2d 81 (1968). It is the contention of the Petitioner that the first statement is a direct reference by the prosecutor of the failure of the Petitioner to testify, coupled with and compounded by the second reference which is indirect but is, nonetheless, a reference especially when taken with the direct reference of the failure to contradict *by the defendant*, and is therefore reversible error.

The defendant next asserts that he was denied his Sixth Amendment right guaranteed by the U. S. Constitution as he was denied the right to examine the prosecutrix and her father by the ruling of the Trial Court concerning

a civil suit brought by the prosecutrix, a minor, by and through her father as her next friend, in the sum of \$200,000 involving the same alleged Attempted Rape involved in the criminal case (Tr. 192 and 250).

In Wharton's Criminal Evidence (12th Edition), Section 438, beginning at page 362, it states as follows:

"Great latitude is allowed on cross-examination for the purpose of showing interest on the part of a witness in the subject matter of the prosecution, or in the prosecution itself. Thus, a witness for the defendant may properly be asked whether he had contributed to the expense of the trial, or whether the defendant had furnished funds which enabled the witness to appear in court. A witness for the prosecution may properly be asked whether he was to be paid a certain sum in case of conviction, or whether a detective-witness' compensation and manner of payment depended upon a conviction.

*"A witness for the prosecution may be cross-examined as to his pending or contemplated civil action for damages against the defendant, stemming from the same conduct for which the defendant is being prosecuted."* (Emphasis ours)

It is therefore the contention of the defendant that the Trial Court should have permitted him to examine, in detail, the prosecutrix and her father in regard to the civil suit that these witnesses had filed against the defendant.

The evidence is insufficient to sustain the conviction and verdict of the jury.

The evidence of the prosecutrix would tend to indicate the defendant guilty of the offense of Outraging Public

Decency, contrary to Title 21, Oklahoma Statutes, Section 22, an Assault and Battery, or Contributing to the Delinquency of a Minor, but not Attempted Rape.

In reversing a conviction for attempted rape, this Honorable Court stated in the case of *Hall v. State*, Okl.Cr., 93 P.2d 1107, at page 1118, as follows:

"The intent is the gist of the offense charged against the defendant; and every laying of hands on a female under the age of consent, even though improper, does not necessarily imply intent to have sexual intercourse. Indecent liberties may be taken with a child without any such intent. Our statutes recognize this in providing a penalty for taking indecent liberties with a female child without intent to commit the crime of rape. Penal Code, Sec. 1769, O.S., 1931, 21 Okl. St. Ann., § 22; West v. State, 27 Okl. Cr. 125, 25 P. 2d 556.

"An assault with attempt to rape or attempt to commit rape includes every element of the crime of rape except the accomplishment. The intent of rape must be coupled with the specific intent to make out an offense. Intent, which is essential to support a conviction of an attempt to commit rape, cannot be assumed, but must be shown by competent evidence, and beyond a reasonable doubt."

It is well settled in Oklahoma that conviction for a crime must be based on competent evidence sufficiently beyond a reasonable doubt. *Thigpen v. State*, Okl.Cr., 462 P.2d 270 (1969). Each and every material element must be supported by the evidence. *Bristow v. State*, 67 Okl.Cr. 355, 94 P.2d 254 (1939).

It is the contention of defendant that the State did not prove by sufficient, competent, relevant, or material evi-

dence the elements, and all of them, of the crime of attempted rape. If the defendant had intended to rape the prosecutrix, the testimony of prosecutrix revealed the defendant had opportunity and ample and sufficient time to complete the crime if that were, in fact, his intent.

#### **CONCLUSION**

It is the contention that the right of the defendant to receive a fair and impartial trial was denied and that because of the errors committed during the trial the defendant's life, liberty, and property were taken without due process of law; and because of these errors, the cause should be reversed and remanded with instructions to grant defendant a new trial.

WHEREFORE, premises considered, Petitioner respectfully requests this Court grant certiorari and reverse the judgment entered in the Court below.

Respectfully submitted,

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*Attorney for Petitioner*

November, 1977

**CERTIFICATE OF SERVICE**

This is to certify that on this \_\_\_\_\_ day of November, 1977, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals to the Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma 73105.

KENNETH P. CRAIG

**APPENDIX "A"**

AUTHORIZED FOR FILING

APR 7 1977

COURT OF CRIMINAL APPEALS

**IN THE COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA**

GENE THOMAS REEVES, )  
Appellant, )  
-vs- ) No. F-76-391  
THE STATE OF OKLAHOMA, )  
Appellee. )

**- O P I N I O N -**

BLISS, Judge:

The appellant, Gene Thomas Reeves, hereinafter referred to as defendant, was charged, tried before a jury in a two-stage proceeding and convicted in the District Court of Cleveland County, Case No. CRF-74-108, for the crime of Attempted Rape, After Former Conviction of a Felony. The defendant appealed to this Court in Case No. F-74-761 and by opinion dated May 12, 1975, *Reeves v. State*, Okl.Cr. 535 P.2d 706, the first conviction was reversed and the cause remanded for new trial. Subsequently, the case was retried and the defendant was again convicted, the jury assessing punishment at a term of fifteen (15) years under the direction and control of the Department of Corrections of the State of Oklahoma. From a judgment and sentence in accordance with the verdict the defendant has again perfected his appeal.

Briefly stated the evidence adduced at trial is as follows. The prosecutrix testified that on February 22, 1974,

she was fourteen years of age and went to the defendant's jewelry store in Moore to deliver a ring which the defendant was to sell for her father. While there the defendant asked her if she would like to work in the store and stated that if she could she should return in about thirty minutes. The prosecutrix then left, checked with her parents, changed into a dress and returned to the store about 6:00 p.m. The defendant took her to the back room and attempted to teach her to engrave and while in the process kissed her on the lips. The defendant then asked her to add up the day's receipts and return to the front of the store. Shortly thereafter he returned to the back and started kissing her again. He then stood her up, holding her arms behind her back and in response to her protests stated that he would not hurt her and would be gentle. With his free hand he then raised her dress, pulled down her hose and underpants and began to fondle her vagina. He then proceeded to unzip his pants and produced his penis. She then testified that the defendant, "put his hands on me and his fingers, and he was trying to get himself where he could get in me." He then heard the chimes on the front door and a customer came in the front. The defendant yelled, "We're closed." The witness was trying to scream and the defendant told her that if she didn't shut up he would kill her. After about five minutes the customer left, and shortly, the witness again heard the door chime and the defendant again yelled, "We're closed." The defendant's wife responded, "No we're not." The prosecutrix then moved causing the defendant to fall to the floor and she then rearranged her clothing and walked into the front part of the store. The defendant's wife asked what was going on and the witness told her she thought the defendant had raped her. The defendant's wife asked her not to contact the police. The witness then saw her sister and a friend outside the store and left. Subsequently, the incident was reported to the police and the witness was taken to the hospital for a medical examination. The witness testified that she was not actually raped and

during the assault the defendant offered to raise her salary from \$75.00 per week to \$200.00 per week. On cross-examination the witness testified that approximately 30 minutes passed between the time the defendant stood her up and held both hands behind her back and the arrival of the defendant's wife.

Cindy McGuffey then testified that she and the prosecutrix's sister drove to the defendant's jewelry store to pick up the prosecutrix at approximately 7:40 p.m. and waited about twenty minutes for her to come out. She further testified that when the prosecutrix came out she stated that she had been raped by the defendant. The witness described her as being in tears and nervous. Charlene Barnhill then testified that on the evening in question the prosecutrix came to the Barnhill home between 8:30 and 8:45 and stated that she had been raped. Mrs. Barnhill described the prosecutrix as being hysterical and almost to the point of being in shock. She checked the prosecutrix and found that she was not hurt or bleeding but that her vaginal area was very red and irritated. Her husband then called the sheriff and the prosecutrix was taken to the hospital for medical examination. The prosecutrix's father then testified that at approximately 5:30 p.m. on the date in question he received a phone call from the defendant concerning his daughter going to work in the jewelry store and it was agreed that she could work at the store. He stated that he next saw his daughter later that evening at the Barnhill home where his daughter was very upset and told him that she had been raped. The State subsequently rested.

The defense then called the defendant's wife, Elda Reeves, who testified that on the date in question she and her daughter drove to the jewelry store to pick up her husband around 7:30 p.m. and were waiting outside the car when they noticed a customer go into the store and look at merchandise for approximately ten minutes although no one waited on her. When the customer left Mrs. Reeves

went into the store to see what was delaying her husband. When she walked in the store the defendant was standing in the middle door with his back to her. When the defendant heard the door open he stated, "we are closed." The witness further testified that the prosecutrix was standing in front of the defendant and they were holding hands. In response to his wife's inquiries the defendant stated that he had been teaching the prosecutrix how to engrave. The prosecutrix went back into the back room to get her purse and then walked into the front of the store where she told the witness that the defendant had been "kissing on" her and trying to make love to her and then left. She further testified that her husband's pants were not unzipped.

After the jury returned a verdict of guilty in the first stage of the proceeding the State submitted proof, over the defendant's objection and offer to stipulate, of the defendant's prior conviction for assault with intent to rape. The jury assessed punishment as set out above.

On appeal defendant presents seven assignments of error which we have considered at length, together with the excellent briefs filed by the respective parties and authorities cited therein. While there is some merit to the assignments of error, they do not require discussion in this opinion. For the second time we have received evidence which unmistakably and overwhelmingly supports the verdict of the jury, and we are of the opinion that if the case were resubmitted to a jury for a third time, absent the errors of which the defendant now complains, the jury could arrive at only one verdict—that of guilt.

Under such circumstances these errors must be considered harmless under the Harmless Error Doctrine set forth in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), and *Schnable v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972).

While we have no hesitation in finding that the errors did not contribute to the verdict of guilt, we cannot say that

they did not contribute to the jury's assessment of punishment, and therefore hold that the judgment and sentence should be modified from fifteen (15) years' imprisonment to a term of ten (10) years' imprisonment, and as so MODIFIED, judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT,  
CLEVELAND COUNTY, OKLAHOMA,  
HONORABLE EDWARD M. McDANEL, JUDGE.

GENE THOMAS REEVES, Appellant, was convicted for the crime of Attempted Rape, After Former Conviction of a Felony; his punishment assessed at a term of fifteen (15) years' imprisonment, and he appeals. Judgment and sentence is MODIFIED to ten (10) years' imprisonment, and as so MODIFIED, judgment and sentence is AFFIRMED.

BILL PIPKIN,  
MOORE, OKLAHOMA,  
Attorney for Appellant,

LARRY DERRYBERRY, ATTORNEY  
GENERAL, BILL J. BRUCE, ASST.  
ATTY. GEN., Attorneys for Appellee.

OPINION BY BLISS, J.,  
BUSSEY, P. J., AND BRETT, J.,  
CONCURS.

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**A P P E N D I X "B"**

**F I L E D**  
In Court of Criminal Appeals  
State of Oklahoma  
APR 22 1977  
ROSS N. LILLARD, JR.  
Clerk

**IN THE COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA**

GENE THOMAS REEVES, )  
vs. Plaintiff, ) Case No. F-76-391  
THE STATE OF OKLAHOMA, )  
Defendant. )

**PETITION FOR REHEARING**  
**COMES NOW GENE THOMAS REEVES, Appellant**

herein, and respectfully represents to this Court that on April 7, 1977, an opinion was rendered by this Court in the matter of Appellant's Appeal herein from his conviction in the District Court of Cleveland County, Oklahoma, wherein this Court modified and affirmed his conviction.

That said decision overlooked question decisive of the Appeal and duly submitted and fully briefed by Appellant. Said opinion states in part:

"While there is some merit to the assignments of error, they do not require discussion in this opinion. For the second time we have received evidence which unmistakably and overwhelmingly supports the verdict of the jury, and we are of the opinion that if the case was resubmitted to a jury for a third time, absent the errors of which the Defendant now complains, the jury could arrive at only one verdict—that of guilt."

Said opinion goes on to declare the assignments of errors cited as being harmless.

Appellant would agree with this honorable Court that assignments of error 2, 4, 5, 6, and 7, are probably not of the magnitude to require reversal, but are sufficient errors for modification as this Court so found.

However, assignment of error 1 and 3 Appellant feels are errors of such magnitude that same require reversal of this case for a new trial.

Appellant's first proposition of error asserts the Prosecutor in closing argument committed reversible error in commenting on the failure of Defendant to testify. Appellant feels that this Court overlooked the holding in the long line of cases cited in Appellant's brief which holds that the Fifth Amendment's prohibition against self-incrimination through the Fourteenth Amendment, forbids comments by the Prosecution on the accused's silence. See McGaha vs. State, Okl. Cr., 492 P<sup>2</sup> 1101, Shepherd vs. State, Okl. Cr., 139 P<sup>2</sup> 605, Lime vs. State, Okl. Cr., 479 P<sup>2</sup> 608, Sisk vs. State, Okl. Cr., 487 P<sup>2</sup> 1003, and Title 22 OS 1971, Section 701.

Appellant therefore prays this honorable Court reconsider its opinion in this cause and the above cited authority and hold the Prosecution's comments on Appellant's silence constitute reversal error and grant Appellant a new trial.

Appellant further contends that this Court overlooked the case of Lankister vs. State, Okl. Cr., 298 P<sup>2</sup> 1088, which Appellant cited in support of his proposition number 3. Lankister, *supra*, states the following rule on cross-examination in the State of Oklahoma:

"Ordinarily a witness may be asked on cross-examination as to any matter which tends to disclose his friendship or bias in favor of either the state or the defendant for the purpose of affecting his credibility

as a witness. Kilpatrick v. State, 90 Okl. Cr. 276, 213 P.2d 584, 585. Also in Blumhoff v. State, 72 Okl. Cr. 339, 116 P.2d 212, 213:

On cross-examination, the court should be liberal in allowing a witness to be interrogated on any matter which tends to show bias or prejudice on the part of the witness or friendship or enmity toward either of the parties or circumstances under which he has a temptation to swear falsely. Chapman v. State, 28 Okl. Cr. 208, 230 P. 283; Yoder v. State, 18 Okl. Cr. 637, 197 P. 848; Cassady v. State, 18 Okl. Cr. 568, 197 P. 171.'

*It is thus apparent that the trial court committed reversible error in not permitting the witness, Mrs. Logan, to be cross-examined on this issue."*

Also, the Appellant would refer this Court to Wharton's Evidence (12th Edition) Section 438 at page 362, which states:

"A witness for the prosecution may be cross-examined as to his pending or contemplated civil action for damages against the defendant, stemming from the same conduct for which the defendant is being prosecuted."

It is respectfully submitted that this Court, in its opinion, overlooked the above cited authority that Appellant cited in support of his proposition numbers 1 and 3.

WHEREFORE, Appellant prays that this Honorable Court grant Appellant a rehearing and thereafter withdraw its former opinion and grant Appellant a new trial.

s/ Bill Pipkin  
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s/ Kenneth P. Craig  
 Kenneth P. Craig  
 Attorney for Appellant  
 115 S. Broadway  
 Moore, Oklahoma 73160  
 Telephone: (405) 799-3351

[Certificate of Mailing omitted in printing.]

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## APPENDIX "C"

FILED

In Court of Criminal Appeals  
 State of Oklahoma  
 AUG 24 1977  
 ROSS N. LILLARD, JR.  
 Clerk

IN THE COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA

GENE THOMAS REEVES,	)
Petitioner,	)
-vs-	) No. F-76-391
THE STATE OF OKLAHOMA,	)
Respondent.	)

ORDER DENYING PETITION FOR REHEARING  
AND DIRECTING ISSUANCE OF MANDATE

WHEREAS, the Court having examined the Petition for Rehearing in the above styled and numbered cause, and being fully advised in the premises, finds that the Petition for Rehearing should be, and the same is hereby, *DENIED*.

And the Clerk of this Court is directed to issue the *MANDATE FORTHWITH*.

WITNESS OUR HANDS, and the seal of this Court,  
this 24th day of August, 1977.

s/ Hez J. Bussey  
 HEZ J. BUSSEY, PRESIDING JUDGE  
 s/ Tom Brett  
 TOM BRETT, JUDGE

## ATTEST:

s/ Ross N. Lillard, Jr.  
 CLERK

[Seal]

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**APPENDIX "D"**

**FILED**

In Court of Criminal Appeals  
State of Oklahoma  
**AUG 25 1977**  
ROSS N. LILLARD, JR.  
Clerk

**IN THE COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA**

GENE THOMAS REEVES, )  
                        )  
                        Appellant, )  
-vs-                   )   No. F-76-391  
                        )  
THE STATE OF OKLAHOMA, )  
                        )  
                        Appellee. )

**ORDER STAYING EXECUTION OF MANDATE**

WHEREAS, this Court, on the 24th day of August, 1977, denied the Petition for Rehearing and issued the mandate in the above styled and numbered cause, which exhausted Appellant's State remedies;

AND WHEREAS, counsel for Appellant has announced his intention to appeal to the Supreme Court of the United States and has requested that the Appellant not be committed under the judgment and sentence rendered in the District Court, Cleveland County, Case No. CRF-74-108, for a period of sixty (60) days in order to perfect said appeal;

NOW, THEREFORE, this Court stays execution of the Mandate for sixty (60) days until October 25, 1977; PROVIDED, HOWEVER, if the Supreme Court of the United States assumes jurisdiction, counsel for Appellant should notify this Court and request a further stay.

**IT IS SO ORDERED.**

## APPENDIX I

WITNESS MY HAND, and the Seal of this Court, this  
25th day of August, 1977.

s/ Hez J. Bussey  
HEZ J. BUSSEY, PRESIDING JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.  
CLERK

[Seal]

## APPENDIX "E"

## FILED

In Court of Criminal Appeals  
State of Oklahoma  
OCT 11 1977  
ROSS N. LILLARD, JR.  
Clerk

IN THE COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA

GENE THOMAS REEVES,	)
	)
	) Appellant,
-vs-	) No. F-76-391
	)
THE STATE OF OKLAHOMA,	)
	)
	) Appellee.

## FINAL ORDER FURTHER STAYING MANDATE

NOW, on this 11th day of October, 1977, on oral application of the attorney for Appellant in the above styled and numbered cause, for an extension of time from October 25, 1977, until November 25, 1977, within which to appeal to the United States Supreme Court and for an Order of this Court staying the Mandate until such time, and the Court being fully advised in the premises finds that the same should be granted.

IT IS THEREFORE THE ORDER OF THIS COURT that the Mandate in the above styled and numbered cause, the same being Cleveland County District Court Case No. CRF-74-108, shall be stayed until the 25th day of November, 1977, and issued on that date, unless stayed by Order of the United States Supreme Court.

WITNESS OUR HANDS, and the Seal of this Court,  
this 11th day of October, 1977.

[APPENDIX]

s/ **Hez J. Bussey**  
**HEZ J. BUSSEY, PRESIDING JUDGE**

s/ **Tom Brett**  
**TOM BRETT, JUDGE**

ATTEST:

s/ **Ross N. Lillard, Jr.**  
**CLERK**

[Seal]

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Order in the above matter, as the same remains on file in my office.

In Witness Whereof, I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 11th day of October, 1977.

**Clerk**

**By Norma Hoff**  
**DEPUTY**

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